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## HOONG WAI KIT v. TEH TOONG JOO

HIGH COURT MALAYA, SHAH ALAM
HAYATUL AKMAL ABDUL AZIZ J
[DIVORCE PETITION NO: F-33-958-2011 &
ORIGINATING SUMMONS NO: FLJC-24-2656-2010]
B 30 SEPTEMBER 2019

***FAMILY LAW:*** *Children – Access – Custody, care and control of children of marriage given to husband – Allegation by wife that husband brainwashed children to alienate children from wife – Whether children should be referred to psychiatric*
C *evaluation – Whether allegation of parental alienation supported by evidence – Whether court could act on mere suspicion – Whether children competent to give independent opinion – Whether application superfluous and constituted grave procedural error*

D The petitioner husband ('PH') and the respondent wife ('RW') were legally married and were blessed with two daughters, R and P ('children'). Pursuant to a single divorce petition under s. 53 of the Law Reform (Marriage and Divorce) Act 1976 by PH, the court, on 16 March 2013, granted a *decree nisi*, to be made absolute on 16 August 2013. The custody, care and control of R was given to PH, whereas, the custody, care and control of P was given
E to RW with further orders regarding access. On 16 March 2017, the *decree nisi* was varied whereby the custody, care and control of P was given to PH while RW was granted access. RW alleged that PH had failed to comply with the terms of the order and therefore, applied for leave to institute committal proceedings against PH. However, PH had successfully set aside the leave.
F The application in encl. 171 herein was by RW for an order to refer the children for a psychiatric evaluation where a child psychiatric was to be chosen according to the National Advisor for Psychiatric Services, Ministry of Health, Malaysia and, in the interim, that she be given access to the children in accordance with the *decree nisi* and varied *decree nisi* ('the orders')
G which were still in force. RW grounded her application on the argument that PH had stopped sending the children to her and contended, *inter alia*, that: (i) the reasoning adduced by PH as contained in the two letter written by the children expressing their refusal in wanting to see her was not acceptable and she believed that the letters were written by the children at the insistence of
H PH to alienate her from the children; (ii) she always had good relationship with the children; (iii) when she managed to see the children on 6 February 2019, she failed to notice any such refusal in the children to see her; and (iv) the children be sent for a psychiatric evaluation to determine if at all PH had brainwashed or influenced the children to alienate them from her.

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**Held (dismissing encl. 171 with costs):**

**(1)** Enclosure 171 was PW's standalone application made in response to the application by PH to amend the orders in terms of access to the children by her. It sought an order for the children's referral to a psychiatric evaluation premised on her speculation that the children had been subjected to parental alienation influenced by PH against her. However, claiming parental alienation by PH, anchored on supposition on the part of RW alone would not suffice without looking into the underlying issues. The court could only be persuaded to act upon plausible evidence and not on mere suspicion. (para 8)

**(2)** The children were no longer infants but teenagers, who, in this modern day and age, were competent enough to express their independent opinion and which, for their welfare and benefit, should not be discounted at will unless it could be shown otherwise. The allegation by RW that PH had brainwashed/influenced the children to alienate them from her in the circumstances of the case was too remote and without basis. The mere fact that the children had expressed their desire not to see RW could not *ipso facto* mean that they had psychological issue or had been influenced and must be referred to psychiatrist for assessment. Save and except where there was cogent evidence that is persuasive enough for the court to act upon, the allegation remained merely that, a bare assertion deserving no reaction. (paras 8 & 11)

**(3)** Pursuant to s. 100 of the LRA, in determining issues on custody or maintenance of any child, regard shall be had, if practicable, to the advice of any person who is trained or experienced in child welfare, but the judge shall not be bound to follow such advice. It is the judicial discretion of the judge. RW's request for an interim access to the children was superfluous and unnecessary as the terms of her access to the children had been determined in the orders dated 16 May 2013 and varied on 16 March 2017 accordingly. The application was not intended to vary or enforce the terms of the said orders. Granting her request herein would be akin to countermanding the terms of access as contained in the orders which were still in force. Further, the action taken herein constituted a grave procedural error which could not be allowed. (paras 10 & 12)

**Case(s) referred to:**

*Hoong Wai Kit v. Teh Toong Joo; Boonsri Kanjanawadee (Party Cited) [2017] 1 LNS 467 HC* ***(refd)***

*Jayakumar Karuppanan & Anor v. Jeyakumar Krishnan [2006] 4 MLJ 484* ***(refd)***

*Mahabir Prasad v. Mahabir Prasad [1982] 1 MLJ 189* ***(refd)***

*Viran Nagapan v. Deepa Subramaniam & Other Appeals [2016] 3 CLJ 505 FC* ***(refd)***

**Legislation referred to:**
Divorce and Matrimonial Proceedings Rules 1980, r. 78
Law Reform (Marriage and Divorce) Act 1976, ss. 53, 88, 89, 100
Rules of Court 2012, O. 32 r. 12, O. 40 r. 1(1), (2)

*For the petitioner - Honey Tan Lay Ean & Matt Wong; M/s Tan Law Practice*
*For the respondent - Kelvinder Singh Sidhu; M/s Andy Pheh & Kel Sidhu*

*Reported by S Barathi*

## JUDGMENT

**Hayatul Akmal Abdul Aziz J:**

### Introduction

**[1]** The respondent wife ("RW") had filed an application (encl. 171) seeking an order to refer the children of the said marriage for a psychiatric evaluation where a child psychiatric is to be chosen according to the National Advisor for Psychiatric Services, Ministry of Health, Malaysia. In the meantime, she is to be given interim access of the said children of the marriage as according to the *decree nisi* dated 16 May 2013 and varied *decree nisi* dated 16 March 2017 ("the said orders") which are still in force. She also prays for cost to be in the cause. The petitioner husband ("PH") objected to this application.

**[2]** The relevant cause papers and written submissions, are as follows:

(i) *Decree nisi* dated 16 May 2013 (encl. 63);
(ii) Variation application dated 10 June 2015 (encl. 69);
(iii) RW's affidavit in support affirmed by Teh Toong Joo (encl. 71)
(iv) PH affidavit in reply affirmed by Hoong Wai Kit (encl. 78);
(v) RW's affidavit in reply affirmed by Teh Toong Joo (encl.79);
(vi) PH affidavit in reply (2) affirmed by Hoong Wai Kit (encl. 80);
(vii) RW's affidavit in reply affirmed by Teh Toong Joo (encl. 81);
(vii) PH affidavit in reply affirmed by Hoong Wai Kit (encl. 82);
(ix) PH additional affidavit affirmed by Hoong Wai Kit (encl. 94);
(x) PH additional affidavit (2) affirmed by Hoong Wai Kit (encl. 105);
(xi) Registrar's report dated 30 December 2016 (encl. 112);
(xii) Variation order dated 16 March 2017 (encl. 115);
(xiii) Variation application dated 17 January 2019 (encl.159);
(xiv) PH affidavit in support affirmed by Hoong Wai Kit (encl. 160);
(xv) RW's affidavit in reply affirmed by Teh Toong Joo (encl. 168);
(xvi) PH affidavit in reply (1) affirmed by Hoong Wai Kit (encl. 169);
(xvii) RW's affidavit in reply (2) affirmed by Teh Toong Joo (encl. 170);

(xviii) PH affidavit in reply (2) affirmed by Hoong Wai Kit (encl. 172); A

(xix) Notice of application dated 1 May 2019 (encl. 171);

(xx) RW's affidavit in support affirmed by Teh Toong Joo (encl. 174)

(xxi) PH affidavit in reply affirmed by Hoong Wai Kit (encl. 175);

(xxii) RW's affidavit in reply affirmed by Teh Toong Joo (encl. 176); B

(xxiii) PH affidavit in reply (2) affirmed by Hoong Wai Kit (encl. 180);

(xxiv) RW's affidavit in reply affirmed by Teh Toong Joo (encl. 181);

(xxv) PH affidavit in reply (3) affirmed by Hoong Wai Kit (encl. 185);

(xxvi) Notice of intention to use affidavits (encls. 69, 78, 80, 94, 105, 160 and 169) (encl. 185). C

Submissions/submissions in reply filed by PH and RW.

**[3]** Her application was heard on 11 July 2019 and after perusing the cause papers filed and the respective written submissions of the parties, I dismissed the said application (encl. 171) with cost of RM2,000. D Dissatisfied, RW had filed this appeal and my reasons are as follows.

**Brief Facts**

**[4]** In order to fully appreciate the decision arrived at in the present application, it is my considered view that the relevant chronological E background facts (disclosed from the cause papers) be appraised briefly in order to grasp the events that had unfolded between the parties herein:

(i) They were legally married on 8 July 2003 and are blessed with two daughters named R (now 17+ years old) and P (now 13+ years old), together referred as "the said children". PH had on 21 February 2012 F filed a single divorce petition under s. 53 of the Law Reform (Marriage and Divorce) Act 1976) ("LRA"). On 16 May 2013, at the conclusion of a full trial, the court held that the marriage between the parties had irretrievably broken down and consequently was dissolved with a *decree nisi* to be made absolute on 16 August 2013. Among the orders granted G by the learned judge then was that the custody, care and control of R was given to PH whereas custody, care and control of P was given to RW with further orders regarding access which form the major part of the said decision;

(ii) On 20 May 2016, the Registrar of the High Court interviewed the said H children and issued a Registrar's report dated 30 December 2016 (encl. 112). On 16 March 2017, PH applied to vary the said *decree nisi.* Eventually the application was allowed and the said *decree nisi* was varied whereby custody, care and control of P (the youngest daughter) was awarded to PH while RW was granted access (encl. 115). It is I against the backdrop of this order that she alleged PH had failed to comply with the terms therein, in which event she had applied for leave

A to institute committal proceeding against PH that was allowed. PH however, applied for the said leave be set aside on 30 January 2019 which was duly granted by the court for non-compliance with statutory requirements (encl. 166). This dismissal was not appealed;

B (iii) Against this background, RW now applies for the said children to be referred to a psychiatrist for evaluation. For ease of reference, I produced the prayers in the said application as follows:

(1) Bahawa seorang pakar psikiatri kanak-kanak dilantik oleh Mahkamah untuk menjalankan pemeriksaan dan penilaian kanak-kanak perkahwinan dan menyediakan suatu laporan;

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(2) Bahawa seorang pakar psikiatri kanak-kanak tersebut dipilih menurut garis panduan Penasihat Kebangsaan untuk Perkhidmatan Psikiatri (National Advisor for Psychiatric Services) daripada Kementerian Kesihatan Malaysia;

D (3) Responden diberikan Akses interim kepada anak-anak perkahwinan menurut *Decree Nisi* bertarikh 16/05/2013 dan Perintah Mengubah *Decree Nisi* bertarikh 16/03/2017 yang masih berkuatkuasa;

(4) Kos Permohonan ini dijadikan kos dalam kausa

(iv) Her application is grounded on her arguments that pursuant to the *decree*
E *nisi* dated 16 May 2013 and varied *decree nisi* dated 16 March 2017, she had been granted access of the said children. However, since 24 August 2017, she argued that PH had stopped sending the said children to her as contained in the said order. Her dissatisfaction hinges on the following:

F (a) She cannot accept the reasoning adduced by PH as contained in the two letters written by the said children expressing their refusal in wanting to see her [(exh. T-35 and T-36) – (encl. 174)]. It is her belief that the said two letters were written by the said children at the insistence (brainwashed is the term used by her) of PH to
G alienate her from the said children;

(b) She claimed that she always had good relationship with the said children;

(c) When she managed to see the said children on 6 February 2019, she failed to notice any such refusal in the said children to see her;

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(d) Consequently therefore, she prays that the said children be sent for a psychiatric evaluation to determine if at all PH had brainwashed or influenced the said children to alienate them from her.

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**Submission By RW**

**[5]** PH had earlier made an application (encl. 159) before this court to vary the varied *decree nisi* regarding the terms of the said order for RW's access to the said children and in her response she had lodged her own application (encl. 171) to refer the said children for a psychiatric evaluation. She argued that:

(i) Sections 88 and 89 LRA govern both custody and access and are inseparable from each other;

(ii) The guidelines (National Advisor for Psychiatric Services) are relevant to custody cases as well as issues on access;

(iii) The Ministry of Health has now provided useful guidelines for a medical assessment of child/children in custody cases;

(iv) This application is an application for a 'medical assessment', and therefore the said guideline should be observed;

(v) The guideline was also issued by the National Advisor for Psychiatric Services, Malaysian Ministry of Health that had issued a press release dated 25 May 2019 announcing the new International Classification of Diseases (ICD-11) which had included the diagnosis of parental alienation specifically, the loss of an emotionally close relationship, such as of a parent by death or permanent departure or rejection;

(vi) I was alluded to several cases, one of which is the present case *Hoong Wai Kit v. Teh Toong Joo; Boonsri Kanjanawadee (Party Cited)* [2017] 1 LNS 467; [2017] 11 MLJ 592, where PH himself had appointed a psychiatrist, Dr Mary Joseph Marret to assess the said daughters, as can be seen in the reported decision of the order of this court dated of 16 March 2017. This court had always allowed psychiatric evaluations to be conducted;

(vii) PH had failed to show how the said assessment would negatively impact the said children;

(viii) He opposes this application as he does not want the truth to be known that there is parental alienation in the present case as a result of the brainwashing committed by him;

(ix) PH had produced two letters that he insisted are written by the said children [(exh. T-35 and T-36) – (encl. 174)], the contents of which express hatred that is incompatible with the facts claimed by RW.

**Submission By PH**

**[6]** PH strenuously objects to this application as follows:

(i) There is no cogent evidence to show or even suggest parental alienation allegedly committed by PH except for RW's own speculative supposition and therefore in such circumstances, it is unnecessary to refer the said children for a psychiatric evaluation;

(ii) Attempts had been made to convince and persuade the said children to meet up with RW which had resulted in access on 6 February 2019;

(iii) The said children are not suffering from any mental illness or distress that requires such an examination;

(iv) It is RW's insistence on forcing the said children to meet up with her that had created friction and pressure on the said children's relationship with her;

(v) What was required had been done when the learned Senior Assistant Registrar had interviewed the said children for an hour each to assess their reaction in meeting up with RW and they had expressed their refusal to have access with her. To force the issue on these teenage girls would be detrimental rather than beneficial to them. The two letters written by the said children that they refuse to have access with RW is clear and had always been their stand on the matter;

(vi) To subject the said children to a psychiatric assessment because RW cannot accept the decision of the said children (to the extent of rejecting that they wrote the said letters) would not be in their best interest;

(vii) The National Advisor for Psychiatric Services Guidelines found in exh. "T-37" (encl. 174) is not applicable in the present case as it is intended for the purpose of determining custody of children: "Guideline: On Medical Assessment of Child Custody Cases".

(viii) It is not meant for situations such as this where RW is attempting to force the said children to see her when it is very much against their wishes at an age where they can express their opinion;

(ix) In the present case, custody proceedings had already been determined as contained in the said orders and RW did not seek a variation of the terms of the said custody order;

(x) Prayer 3 of the present application (encl. 171) is misconceived and erroneous since it is neither seeking for a variation of the order nor is it for enforcement of the said order.

**The Law**

**[7]** RW in her submission referred this court to various law/Rules as follows. Section 100 of Law Reform (Marriage and Divorce) Act 1976 ("LRA") provides as follows:

s. 100. Court to have regard to advice of welfare officers, etc.

When considering any question relating to the custody or maintenance of any child, the court shall, whenever it is practicable, take the advice of some person, whether or not a public officer, who is trained or experienced in child welfare but shall not be bound to follow such advice.

Rule 78 of the Divorce and Matrimonial Proceedings Rules 1980 (the 'said Rules') provides that:

78. Reference to welfare officer

(1) A judge or the registrar may at any time refer to a welfare officer for investigation and report any matter arising in matrimonial proceedings which concerns the welfare of a child.

(2) Without prejudice to paragraph (1), any party to an application to which Rule 76 applies may, before the application is heard, request the registrar to call for a report from a welfare officer on any matter arising on the application, and if the registrar is satisfied that the other parties to the application consent and that sufficient information is available to enable the officer to carry out the investigation, the registrar may refer the matter to a welfare officer for investigation and report before the hearing.

(3) Where a reference is made under this Rule:

(a) the welfare officer may inspect the court file;

(b) after completing his investigation, the officer shall file his report and the registrar shall thereupon notify the parties that they may inspect it and may bespeak copies on payment of the prescribed fee;

and

(c) the registrar shall give notice to the officer of the date of hearing of the application or other proceeding

Order 40 r. 1(1) and O. 40 r. 1(2) Rules of Court 2012 "RC 2012" provides as follows:

Appointment of expert to report on certain question (O. 40 r. 1)

1.(1) In any cause or matter in which any question for an expert witness arises, the Court may at any time, on its own motion or on the application of any party, appoint an independent expert or, if more than one such question arises, two or more such experts, to inquire and report upon any question of fact or opinion not involving questions of law or of construction.

(2) An expert appointed under this Order or under Order 32 rule 12 shall be referred to as a "Court expert".

Order 32 r. 12 RC 2012 provides as follows:

A Obtaining assistance of assessors or experts (O. 32 r. 12)

12. If the Court thinks it expedient in order to enable it better to determine any matter arising in proceedings in Chambers, it may obtain the assistance of an assessor or expert pursuant to Order 33 or Order 40, as the case may be.

B **Findings Of This Court**

**[8]** RW's application (encl. 171) herein is not an application intended to vary the said orders nor is it an application intended to enforce the terms on custody in the said orders against PH. It is in effect a standalone application made in response to the application by PH to amend the said orders in terms C of access to the said children by her. From her arguments as can be seen at p. 42 (encl. 182), it merely seeks an order for the children's referral to a psychiatric evaluation premised on her speculation that the said children have been subjected to parental alienation influenced by PH against her. However, she had not been able to adduce any kind of corroboration to back D up or even legitimately suggest such a claim except for her gut feelings and suspicions since the children allegedly do not want to visit or be with her. She relies on a medical literature adduced about the issue of parental alienation. At this juncture, that it is to be noted that currently, there are no laws on parental alienation, and neither is it illegal. Only education of E feuding divorce couples on this subject can be of help as to how it will impact the children of the marriage in order to mitigate the issue from becoming severe. However, in the present case, the court can only be persuaded to act upon plausible evidence and not on mere suspicion. The entire background events that painted the backdrop leading to the granting of the said orders on F custody and access to the said children must be carefully explored and examined in order to discover whatever underlying issues or problems that had sowed the discontent and created the distance between the said children and RW. I therefore opine that, claiming parental alienation by PH, anchored on supposition on the part of RW alone will not suffice without looking into the underlying issues. The said children are no longer infants but G teenagers, who in this modern day and age are competent enough in the circumstances to express their independent opinion and which for their welfare and benefit should not be discounted at will unless it can be shown otherwise. It is a rule of practise that simpler explanations are more likely to be correct by avoiding unnecessary or improbable assumptions. In *Viran* H *Nagapan v. Deepa Subramaniam & Other Appeals* [2016] 3 CLJ 505, the Federal Court ruled (para 4a) *inter alia* as follows:

(i) In considering the wishes of the child, the court must consider the possibility that the child might have been influenced by people surrounding the child; I

(ii) A determination as to whether a child can express an independent opinion depends greatly on the circumstances peculiar to the facts of the case and the assessment of the judge;

(iii) Subject to rebuttal, children above the age of seven years can give independent opinion;

(iv) The wishes of the parents will not be of much significance unless it can be shown they are in line with the welfare of the child; and

(v) However, if the welfare of the child is equally balanced with the wishes of either of the parents, the wishes of the relevant parent might tip the scale.

**[9]** It is trite that what can be asserted without evidence can be dismissed without evidence and extraordinary claims require extraordinary evidence. The burden of proof is always on the person who brings a claim in a dispute. In the circumstances of the case, I hold RW's argument to be a fallacious argument and because of the letters and refusal to see her therefore the most likely outcome is that said children had been negatively influenced by PH (parental alienation syndrome), while other pertinent underlying factors are not considered to appraise the outcome that had resulted in the said orders being granted.

**[10]** Reference had been made to s. 100 LRA where it is said that in determining issues on custody or maintenance of any child, regard shall be had if practicable to the advice of any person (public officer or otherwise) who is trained or experienced in child welfare, but the judge shall not be bound to follow such advice. It is the judicial discretion of the judge. This application by RW which is a standalone application, is not intended to vary or enforce the terms of the said orders and consequently, can be viewed as an indirect attempt to revisit the issue of custody when issues on custody and access had been dealt with and determined in the said orders (custody of the said children are given to PH and RW given right of access) which remains in force till to date.

**[11]** In referring to this section, RW hinges on her hope that the court would agree to the appointment of a psychiatrist to carry out a psychological evaluation of the said children for the court to act upon but is completely blurred on the ultimate purpose of the exercise since it is neither for variation nor for enforcement. The terms of the said orders remain. When RW herself is unsure of her own objective, it would not be just in the circumstances to subject the said children to the proposed exercise on top of the fact that there is no cogent evidence adduced to move the court to make such a decision. As was said in *Jayakumar Karuppanan & Anor v. Jeyakumar Krishnan* [2006] 4 MLJ 484, weight should be given to the evidence of expert witness in assessing the interest and welfare of a child but in the present case, the said order had been granted and intended revisit of such an order requires a variation with the right circumstances. The Federal Court in *Mahabir Prasad v. Mahabir Prasad* [1982] 1 MLJ 189, had ruled that the welfare of a child is paramount and the court must look at the conduct of parties, their financial and social status, the sex and age of the child, his wishes as far as they can

A be ascertained depending on the age of the child, the confidential reports which a social welfare officer may put up and whether in the long run it would be in the greater interest, welfare and happiness of the child to be with one parent rather than with the other. RW alleged that PH had hindered access to her since August 2017 (encl. 174) but admitted that she had access
B to the said children on 6 February 2019. PH argued that he was the one who had coaxed and persuaded the said children to visit RW for the Chinese New Year even though they strongly refuse for reasons as stated in their two written letters [(exh. T-35 and T-36) – (encl. 174)]. Consideration must be given to the fact that the said children are now aged 17+ and 13+ years of
C age in this modern day and age. They can give independent opinions in the circumstances of this case. Looking at *Viran Nagapan v. Deepa Subramaniam (supra)* and the pronouncements of the Federal Court, the said children in this case are in their teens and based on that authority, unless rebutted, they can give an independent opinion of what they want as regards to access by RW. After all, it is about them and not the feuding parents. Their welfare and
D interests are paramount for their continued development. It is for the feuding parents to facilitate their wishes within the parameters of what is needed by the said children's and not otherwise. As opined earlier, the allegation by RW that PH had brainwashed/influenced the said children to alienate them from her in the circumstances of the case is too remote and without basis as
E stated in my findings earlier. The mere fact that the said children had expressed their desire not to see RW cannot *ipso facto* mean that they have psychological issues or had been influenced and must be referred to a psychiatrist for assessment. Save and except where there is cogent evidence that is persuasive enough for the court to act upon, the allegation remains
F merely that, a bare assertion deserving no reaction.

**[12]** RW is also praying for an interim access to the said children. However, I hold this request to be superfluous and unnecessary as the terms of her access to the said children had been determined in the said orders dated 16 May 2013 and varied on 16 March 2017 accordingly. As the order had
G been sealed and finalised, no further order ought to be granted save for variation and enforcement purposes. Such is not the purpose in this application by RW and granting her request herein would be akin to countermanding the terms of access as contained in the said orders which are still in force when variation was not applied for. I further hold that the action
H taken herein constitutes a grave procedural error which cannot be allowed.

**Conclusion**

**[13]** In light of the foregoing and after closely scrutinising the application and examining all evidence adduced before me, I dismissed RW's
I application (encl. 171) with cost RM2,000.